United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

T-6462

No. 76-6145

(To Be Argued by Mr. George Eng)

B

PLS

United States Court of Appeals
For the Second Circuit

LOREN E. DAMON, JR., by his next friend, VIVIAN F. DAMON,
APPELLANT,

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
DOCKET NO. 74-161

BRIEF FOR THE APPELLEE

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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ISSUES PRESENTED FOR REVIEW

1. Whether there is substantial evidence in the record to support the decision of the Secretary of Health, Education, and Welfare that because State foster care payments did not constitute contributions by the wage earner toward the child's support, the wage earner did not provide at least one-half of the child's support in the year before the wage earner became entitled to retirement insurance benefits and the claimant therefore failed to meet the requirements of Social Security Act §202(d)(8), 42 U.S.C. §402(d)(8), for entitlement to child's insurance benefits.

2. Whether Social Security Act §202(d)(8), 42 U.S.C. §402(d)(8), violates the Due Process Clause insofar as it conditions certain adopted children's receipt of child's insurance benefits upon a showing that the wage earner provided at least one-half of the child's support in the year before the wage earner became entitled to retirement insurance benefits.

STATEMENT OF THE CASE

1. This is an appeal from a decision of a district court sustaining the constitutionality of Social Security Act §202(d)(8), as amended, 42 U.S.C. §402(d)(8), which, in the case of certain adopted children, conditions the payment of child's insurance benefits upon a showing, satisfactory to the Secretary, that the wage earner provided at least one-half of the child's support in the year before the wage earner became entitled to retirement insurance benefits. Following is a description of the statutory scheme governing payment of child's

insurance benefits.

Child's insurance benefits are payable to a child under the age of 18 (or, in the case of a full-time student, under the age of 22) of a wage earner 1/ who is living if the child is dependent upon the wage earner at the time of application. Social Security Act §202(d)(1)(B) and (C), 42 U.S.C. §402(d)(1)(B) and (C). There is a statutory presumption that a child who has not been adopted by another individual is dependent upon his parents, whether natural or adoptive. Social Security Act §202(d)(3), 42 U.S.C. §402(d)(3).

Other children must establish dependency upon the wage earner to be entitled to benefits. Certain illegitimate children and certain stepchildren must demonstrate dependency. Social Security Act §§202(d)(3) and 216(h)(3), 202(d)(4), 42 U.S.C. §§402(d)(3) and 416(h)(3), 402(d)(4). A child adopted after the wage earner became entitled to retirement benefits must show that he is the wage earner's natural child or stepchild or that he was living with and receiving at least one-half of his support from the wage earner in the year before the wage earner became entitled to retirement benefits. Social Security Act §202(d)(8), 42 U.S.C. §402(d)(8).

2. The appellant Loren E. Damon, Jr. is an adopted child who sought child's insurance benefits on the social security account of the retired wage earner, Vivian Damon. His application was turned

1/ Both parties are using the term "wage earner" to identify the individual who has earned a covered status under the Social Security Act regardless of whether such individual had earned wages or salary or is no longer working.

down initially and on reconsideration by the Social Security Administration. The wage earner and her attorney then appeared at a hearing before an administrative law judge who considered the case de novo and found that the child was not entitled to child's insurance benefits. The Appeals Council approved the hearing decision, rendering it the final decision of the Secretary, subject to judicial review. On June 26, 1974, the claimant instituted an action under Social Security Act §205(g), 42 U.S.C. §405(g), for judicial review in the United States District Court for the District of Vermont.

After considering cross-motions for summary judgment, on July 30, 1975 the District Court remanded the case to the Secretary " . . . for the taking and consideration of evidence on the nature of the Vermont Foster Child Program and for reconsideration of the issue of treatment of the foster care payments." The Appeals Council thereupon remanded the case to an administrative law judge who conducted a hearing at which there appeared the claimant's attorney and a witness from the Vermont Foster Child Program. The administrative law judge's decision upheld the original decision denying benefits to the child. The Appeals Council adopted this decision as the final decision of the Secretary, subject to judicial review.

The case came again before the District Court on cross-motions for summary judgment. In concluding that the Secretary's determination was supported by substantial evidence, was consistent with the governing law, and did not deprive the claimant of equal protection, the District Court granted the Secretary's motion for summary judgment. That

Court's opinion and order dated August 19, 1976, as amended by order dated August 30, 1976, is the subject of this appeal.

4. The facts are as follows:

The wage earner, Vivian F. Damon, born November 12, 1909, became entitled to retirement insurance benefits in November 1971. Claimant Loren E. Place, Jr., now Loren Place Damon, was born July 16, 1961. The wage earner testified that the Welfare Department placed the child in her home when he was about one and a half years old and took him away from her in November 1971. She stated that she and her husband had wanted to adopt the child since he was two years old but that a social worker for the Welfare Department had told them it wasn't necessary and that they would never take the child away from them. When the child was returned to the Damons in December 1971, they began adoption proceedings which became final on August 7, 1972. (Tr. 31-34, 51). 2/

On June 14, 1972, the wage earner filed for child's insurance benefits on behalf of claimant. (Tr. 46-49). The application was denied initially and on reconsideration because it was determined that the legal requirement that the wage earner had provided at least one half of claimant's support for the year before the month in which the wage earner became entitled to retirement benefits was not met. This determination was based on evidence, as enumerated by the wage earner, concerning support received by the claimant from the wage

2/ All references to the administrative transcript are abbreviated "Tr."

earner and other sources. (Tr. 50, 55-57). At the hearing on February 11, 1974, the wage earner testified that when she filed the application for child's benefits she was not aware of the support requirements or the reason for her listing contributions made to the child, that she had spent very little time calculating the contributions, and that she had left out various items. The administrative law judge admitted into evidence a new list of contributions prepared by the wage earner for the support year in question. (Tr. 34-44). From this list and from testimony of the wage earner, the following facts relative to the support period in question were determined.

There were six members of the Damon family, Mr. and Mrs. Damon and four children. The family lived in an owned home valued at $8,000.00 and had another small place where they grew potatoes.

The income for the period was as follows:

$1836.00 - foster children payments ($918.00 for claimant and $918.00 for another foster child)

1126.00 - earnings from employment at a day care center

1461.00 - earnings from employment at a school

456.00 - private pension of wage earner's husband

1800.00 - Social Security benefits of wage earner's husband

2000.00 - Allowance for use of house and for vegetables grown and used by the family

6 /$8679.00 - Total available support for family
$1446.50 - Total available for the claimant Loren

Expenses for claimant in the period were as follows:

436.97 - General
137.00 - Personal
83.17 - 1/6 of $499.00, home expenses
27.50 - 1/6 of $165.00, taxes and insurance
333.33 - 1/6 of $2000.00, allowance for use of house and vegetables
$1017.97 - Total Expenses

On July 30, 1975 this case was remanded to the Secretary for further consideration of the issue of foster care payments. The following documentary evidence was admitted into the record on remand: the State regulations governing the administration of the foster care program (Tr. 130-140); "Guide to Foster Parents" (Tr. 141-157); a document entitled "Financial Arrangements" (Tr. 158; and the foster care agreement (Tr. 159-161).

The State regulations at subsection 3401 cite the authority for the foster care program as "33 Vermont Statutes Annotated 660; 2801," authorizing "the department to provide maintenance, care and supervision of children whose custody has been transferred to the Commissioner of Social Rehabilitation Services." Under subsection 3402, "Foster care is defined as day to day maintenance, care and supervision of an individual placed by the department outside of his home . . ." (Tr. 131). The regulations set forth the procedures and requirements for the licensing of foster homes and the placement of foster children. As pertinent to this case, the regulations at subsection 3603 provide:

> The foster family must have a regular source of income for adequate maintenance of their family group. Foster care payments should not be used to support other members of the household (Tr. 137).

The "Guide to Foster Parents," Part G, notes that " . . . all payments received for care of a foster child should not be reported as income . . ." and " . . . the child may not be claimed as an exemption for income tax purposes." (Tr. 153). The standard monthly allowances, set forth in a statement of Financial Arrangements (Tr. 158), vary with the age of the child and covers room and board, clothing, incidental personal expense items, and a personal spending allowance. It is further provided that when any component of the standard allowance is furnished in full, such as from the child's own earnings or by a parent or other individual, its value shall be deducted from the monthly payment.

Mrs. Enna Remick, Supervisor of Licensing of the Foster Care Program of the Vermont Social Welfare Department, testified before an administrative law judge at a supplemental hearing (Tr. 95-129). She testified that the Department has legal custody of the foster child and supervises the foster home (Tr. 98). She stated that payments made under the State foster care program are intended for the care and support of the foster child and that the amount is determined by law, varies according to the age of the child, and is designed to cover the cost of the child's basic needs (Tr. 99, 104).

Mrs. Remick further testified that the State agency presumes that all payments are spent on the child and that the foster parents are not required to account for actual expenditures or to refund any surplus, except for clothing, as long as the child is adequately cared for. (Tr. 106-107). She indicated that the entire monthly

allotment is low and generally just covers the child's basic needs. (Tr. 104, 106, 117, 120). The care provided by foster parents is governed by the regulations and is monitored through periodic visits by a social worker. (Tr. 98, 99, 113). Mrs. Remick stated that it is expected that foster parents will provide love and attention but stressed that foster parents are not paid for their services. (Tr. 105, 109-110, 118, 120-122).

STATUTORY PROVISIONS

The pertinent statutory provisions of Title II of the Social Security Act, 49 Stat. 622, as added and amended, 42 U.S.C. §402 et seq., are set forth in the addendum to this brief, infra, pp. 1a - 4a.

SUMMARY OF ARGUMENT

The Court below correctly determined that the administrative record contained substantial evidence to support the Secretary's decision. Under the applicable statutory standard for judicial review, the Secretary serves as trier of fact. The duty of the court below was not to decide the case de novo, but to decide whether the record was complete enough for the Secretary to have rendered a final decision and whether the evidence before the Secretary sufficiently supported that final decision.

Moreover, the court below correctly determined that the Secretary properly applied the governing statutory provisions. The Social Security Act provides insurance benefits to dependent children of wage earners. The purpose of the benefits is to replace the support

lost through the death, disability or retirement of the wage earner. The statutory scheme to which the appellant objects is designed to distinguish those situations in which the dependency of the child on the wage earner can reasonably be inferred from those in which it cannot, and to require proof of actual support only in the latter circumstances.

To discriminate against adopted children as such is not a purpose of the challenged classification, but even if it were, the cases do not require strict judicial scrutiny of the statutory scheme. Requiring specific, quantitative proof of support is entirely reasonable. That some children who are deemed dependent under the statutory provisions may not actually be dependent does not render the statutory scheme irrational. Providing for benefits to many dependent children without incurring the administrative burden of case-by-case determinations in classifications in which presumption of dependency is reasonable is the legitimate purpose the statutory scheme serves.

The provision under attack serves the additional legitimate purpose of discouraging adoptive relationships after retirement when the purpose is to secure child's benefits in situations not within the intended scheme for insurance coverage. That the narrow rule is imprecise is not a constitutional infirmity. Because any after-adopted child who can demonstrate the kind of dependency required is entitled to benefits, the statutory provision at issue does not constitute a blanket exclusion of a class. Moreover, the

congressional choice of a requirement for dependency during the particular year preceding retirement is a justifiable and reasonable measure.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY AFFIRMED THE SECRETARY'S FINAL DECISION

The District Court's opinion and order dated August 19, 1976, as amended by order dated August 30, 1976, appears in the Appendix submitted with the appellant's brief. In affirming the Secretary's determination that the claimant was not entitled to child's insurance benefits, the court below denied claimant's motion for summary judgment and granted the Secretary's motion for summary judgment. Appellant's Appendix p. 17. Upon a review of the administrative record, the District Court found that the Secretary's final decision was supported by substantial evidence, was consistent with the governing law, and did not deprive the claimant of equal protection. Appellant's Appendix pp. 3-4.

A. Section 202(d)(8) Requires A Showing Of One-Half Support In The Year Preceding Retirement

The statutory scheme for child's insurance benefits is described supra, pp. 1-2. In the case of a living wage earner, Social Security Act §202(d)(1)(C)(i), 42 U.S.C. 402(d)(1)(C)(i), imposes the requirement that a claimant for child's benefits be dependent upon the wage earner at the time of application. Subsection (d)(3) provides that most children shall be deemed dependent at the relevant time of application. For

children who have been adopted by a wage earner after he had become entitled to retirement insurance benefits, subsection (d)(8) creates a presumption of lack of dependency at the relevant time of application.

Subsection (d)(8)(C) appears to create an exception from the presumption of lack of dependency for an after-adopted child who also happens to be a natural child or stepchild of the wage earner. However, the provision constitutes simple recognition that despite being after-adopted, natural children and stepchildren fall within their own classifications and, as such, are treated in other provisions without the need to consider the factor of after-adoption.

As pertinent to this case, subsection (d)(8)(D) provides that despite being presumed not dependent on the wage earner at the time of application, a child adopted after the wage earner's retirement can meet the dependency requirement with a showing that he was living with and receiving at least one-half of his support from the wage earner during the year immediately before the month in which the wage earner became entitled to retirement benefits.

The Secretary's regulations define the one-half support requirement as follows:

> A legally adopted child . . . shall be considered to be receiving at least one-half of his support from the insured individual for the year before the applicable time specified in section 202(d)(9)(B)(i) 3/ if such individual made a contribution, in cash or kind, to such child's support in each of the 12 months preceding the applicable

3/ As originally enacted in 1965, this provision was found in §202(d)(10) of the Act but by subsequent amendment was moved to §202(d)(9) and subsequently to §202(d)(8). (42 U.S.C. §402(d)(9) and 42 U.S.C. §402(d)(8).

time and the total of such contributions over the entire 12 month period equaled or exceeded one-half of such child's support for the year. 20 C.F.R. §404.350(b)(2).

"Support" is defined to include:

> . . . food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported. 20 C.F.R. §404.350(c).

"Contributions" means:

> . . . contributions actually provided by the contributor from his own property, or the use thereof, or by the use of his own credit. 20 C.F.R. §404.350(d).

The District Court deferred to these administrative interpretations of the support requirement because the regulations are not inconsistent with the statute and have not been overturned by Congress. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Lewis v. Martin, 397 U.S. 552, 559 (1970).

B. The Secretary Found That The Claimant Failed To Show One-Half Support In The Year Preceding Retirement

1. Section 205(g) requires affirmance of the Secretary's decision if supported by substantial evidence

A claimant for social security benefits has the right to obtain judicial review after exhaustion of administrative remedies. Social Security Act §205(g), 42 U.S.C. §405(g), delineates the method of judicial review and stands as the exclusive basis of jurisdiction for claims arising under the Social Security Act. Social Security Act §205(h), 42 U.S.C. §405(h), Weinberger v. Salfi, 422 U.S. 749 (1975).

This is an action under section 205(g), 42 U.S.C. §405(g), to review a "final decision" of the Secretary. This section provides,

inter alia, that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . ."

The Secretary is charged with the duty to weigh the evidence, to resolve material conflicts in the testimony and to determine the case accordingly. Richardson v. Perales, 402 U.S. 389 (1971); Moss v. Gardner, 411 F.2d 1195 (4 Cir., 1969); Staples v. Gardner, 357 F.2d 922 (5 Cir., 1966); Stumbo v. Gardner, 365 F.2d 275 (6 Cir., 1966); Celebrezze v. Bolas, 316 F.2d 498 (8 Cir., 1963); Rhinehart v. Finch, 438 F.2d 920 (9 Cir., 1971). The findings of the Secretary are conclusive if supported by substantial evidence and should be upheld even in those cases in which the reviewing court, had it heard the same evidence de novo, might have found otherwise. Reyes Robles v. Finch, 409 F.2d 84 (1 Cir., 1969); Labee v. Cohen, 408 F.2d 998 (5 Cir., 1969); Walters v. Gardner, 397 F.2d 89 (6 Cir., 1968).

2. The Secretary's decision was supported by substantial evidence and therefore correctly affirmed by the District Court

The sole issue in determining whether or not the claimant meets the one-half support requirement of Social Security Act §202(d)(8)(D), 42 U.S.C. §402(d)(8)(D), is the status of the foster care payments which comprised more than one-half of the claimant's support during the year in question. The contention that foster care payments actually

represent payment to foster parents for their services is contradicted by the evidence. Foster care payments cover room and board, clothing, incidental personal expense items, and a personal spending allowance. (Tr. 158). Although the Vermont Department of Welfare is concerned with the total well-being of the foster child and expects foster parents to provide love, attention, and emotional support, Mrs. Remick made it clear throughout her testimony at the administrative hearing that foster parents receive no remuneration for their services. (Tr. 104-105, 109-111, 118, 120-122).

The evidence shows that foster care payments are intended solely for the support of the foster care child. The restraint on the use of foster care payments may be broad, but nonetheless it exists. It is presumed that the foster care payments are being spent on the foster child since the amounts are deemed only sufficient to provide for the child's basic needs. As long as the child's needs are being met, the State does not concern itself with actual expenditures other than for clothing. (Tr. 99, 104, 106-107, 112-113, 120).

That foster parents are not required to account for expenditures or to refund excess payments seems to be only a matter of practicality in light of financial realities. It is conceivable that, because of frugal spending or use of home grown food, there might be some surplus of foster care payments. Yet, it seems more likely that foster parents might have to supplement the foster care payments with their own funds in supporting the child. In any event, the State does not intend that foster parents profit from foster care payments. (Tr. 104-106, 117-118, 120). In fact, foster care payments cannot be used to support

other members of the household (Tr. 137) and are not reportable as income for tax purposes (Tr. 153). Furthermore, if other sources of support are made available to the child, the amount of foster care payments may be adjusted downward. (Tr. 158).

The evidence of record demonstrates that foster care payments do not constitute payments for services, either in theory or in practice. Rather, foster care payments are solely for the support of the foster child. Such payments can only be considered as contributions either from the State or possibly from the foster child himself, being paid by the State on behalf of the child. There is not basis, however, for considering foster care payments as contributions from the foster parents. The wage earner, therefore, did not provide at least one-half of the claimant's support during the year in question.

The District Court found that the testimony of Mrs. Remick made it clear "that foster care payments are not designed as compensation to the parents." Appellant's Appendix p. 7. The District Court further found that foster parents do not acquire the State payments as their "property," and that the funds "are contributed by the State." Appellant's Appendix p. 8. Besides arriving at these conclusions comporting with those of the Secretary, the District Court specifically determined that based on the administrative record as a whole, the Secretary's final decision was supported by substantial evidence. Appellant's Appendix pp. 3-4.

3. Ketcherside v. Celebrezze is distinguishable

Appellant relies heavily on Ketcherside v. Celebrezze, 209 F. Supp. 226 (D. Kansas, 1962). In that case children claimed benefits

on the social security account of their deceased mother. At issue was whether they had received at least one-half of their support from their mother, the deceased wage earner.

The father contended that workmen's compensation benefits received should not have been "considered as income to the family for the purpose of support since such payments were actually his to indemnity him for the injury to his leg." 209 F. Supp. at 229. However, the court noted that the total funds available to the family were not in question and it was "admitted that the monies received by both mother and father from all sources were used for the support of the family . . ." 209 F. Supp. at 228. It was in that context that the court discussed the total contributions of the mother and father for social security benefit purposes and stated that "contributions should be considered without regard to source." 209 F. Supp. at 229.

Ketcherside therefore hardly constitutes a foundation for arguing that workmen's compensation benefits are, as a matter of law, includable as contributions by a parent toward the support of a child. Indeed the court merely decided the decision of the Secretary denying children's benefits was supported by substantial evidence. 209 F. Supp. at 229-230.

Moreover, there is no indication why workmen's compensation benefits should be treated like foster care payments. Taken together, the decisions of the Secretary in Ketcherside, supra, and in the instant case, as well as the affirming decisions of the respective district courts, demonstrate little if not the likelihood that like treatment is inappropriate. In any event, the proper way to decide

whether any funds constitute support by the wage earner was the ultimate administrative course of action followed below and affirmed upon court review.

II

SECTION 202(d)(8) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Challenged Statutory Provision Must Be Sustained If It Has A Rational Basis

The appellant attacks Social Security Act §202(d)(8), 42 U.S.C §402(d)(8), as violative of the Due Process Clause in respect of its embracing of the equal protection of the laws. The Secretary submits that the proper standard for review is the traditional rational basis test enunciated in Dandridge v. Williams, 397 U.S. 471 (1970):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426.

In Weinberger v. Salfi, supra, the Supreme Court recently reaffirmed the applicability of the "reasonable basis" test in cases, such as this one, arising under social welfare legislation. In a case involving social security benefits for illegitimate children, the Supreme Court disapproved the lower court's application on the strict scruitny test. Mathews v. Lucas, No. 75-88, June 29, 1976, 44 U.S.L.W. 5139.

Since this case, like Flemming v. Nestor, 363 U.S. 603 (1956), involves not "freedoms guaranteed by the Bill of Rights" (Dandridge, supra, 397 U.S. at 484), but benefits provided by statute "[i]n the area of * * * social welfare" (id. at 485), the traditional "rational basis" test governs the validity of the Social Security Act provisions here in question. Thus, the challenged statutory classification must be sustained if there is any rational reason for that classification; and "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." Flemming v. Nestor, supra, 363 U.S. at 612 (citations and footnote omitted).

The appellant offers Rogers v. Weinberger, CCH Unemployment Insurance Reporter para. 17,490 (E.D. Tenn., 1973), in direct support of his case. The court in that case decided that although the reason for the challenged classification, to provide safeguards against abuse through adoption of children solely to qualify them for benefits, was a legitimate interest, the classification enacted was not rational. That children adopted for laudable motives could be denied benefits while children conceived solely to qualify for benefits could not be denied was the court's reason for finding the classification irrational. Furthermore, the court believed that the abuse of concern to Congress was unlikely to occur because adoptions, particularly in Tennessee are strictly regulated.

If effect, the Rogers court applied the wrong standard of review. Similarly, the appellant asks the court to consider the wisdom of congressional action which has the effect of being imprecise. However, the proper inquiry for the court is not to consider the wisdom of the classification, whether it is mathematically precise, but whether it is a rational course. "The question is whether Congress, in concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." Weinberger v. Salfi, supra, 422 U.S. at 777.

B. The Statutory Provision Has A Rational Basis And Furthers The Legislative Purpose

1. Child's insurance benefits are designed to replace the support lost by virtue of the wage earner's retirement

The challenged provision is a part of a statutory scheme whose purpose is to provide for deceased, disabled, and retired wage earners' children who can demonstrate dependency upon the wage earner at a relevant time set forth in the statute. The "primary purpose of [child's insurance benefits] is to provide support for dependents of a . . . wage earner." Jiminez v. Weinberger, 417 U.S. 628, 634 (1974).

The congressional intent also is directly inferable from the structure of the statutory scheme. The basic eligibility requirement is, as we have seen, that the child have been "dependent upon [the

wage-earner]." But Congress understandably chose to avoid imposing upon claimants and the Secretary the necessity of case-by-case determinations of the fact of dependency. Instead, Congress provided a short-cut procedure for proving actual dependency by circumstantial evidence. Thus dependency is presumed where the readily documented facts pertaining to the relationship between the wage earner and the child suggest the likelihood of actual dependency.

Directly applicable to the challenged provision is a passage from the legislative history attending P.L. 92-603, Social Security Amendments of 1972:

> . . . your committee believes that benefits for a child who is adopted by a worker already getting old-age disability benefits should be paid only when the child lost a source of support because his parent retired or became disabled, and that the law should include safeguards against abuse through adoption of children solely to qualify them for benefits. H.R. Rep. No. 92,231, 1972 U.S.C. Cong. & Adm. News 4989, 5039.

2. The statutory scheme has a rational basis and furthers the legislative purpose

Although most children are not required to establish dependency, but instead receive the benefit of a statutory presumption, the Supreme Court upheld Social Security Act §§202(d)(2) and 216(h)(3)(C)(ii), 42 U.S.C. §§402(d)(3) and 416(h)(3)(C)(ii), which condition the eligibility of certain illegitimate children for benefits upon a showing that the deceased wage earner was the child's parent and, at the time of death, was living with the child or contributing to his support. Mathews v. Lucas, supra. It was clear to the Court that if child's benefits were conditioned on dependency and the statutory scheme

classified children as legitimate, acknowledged, adopted, etc., only for the ultimate purpose of determining dependency, and if benefits were intended to replace the support lost through the death of a wage earner-parent, then "conditioning entitlement on dependency at the time of death is not impermissibly discriminatory in providing only for those children for whom the loss of the parent is an immediate source of need." 44 U.S.L.W. at 5143. Despite recognizing that the statutory presumptions of dependency resulted in overinclusiveness, some children receiving benefits whether or not they could prove dependency in fact, the court felt that the classifications were permissible because they were "reasonably related to the likelihood of dependency at death." 44 U.S.L.W. at 5143.

The legislative history relating to the classification of children adopted after the wage earner's retirement, H.R. 92-231, supra, evidences the same congressional concern established for the classification at issue in Mathews v. Lucas, supra: an after-adopted child should be paid only when he has lost a source of support because his parent has retired.

The classification of after-adopted children exists only for the ultimate prupose of determining dependency. Both the statutory scheme and the legislative history make it clear that benefits are intended to replace the support lost through the retirement of a wage earner-parent. Therefore, conditioning entitlement on dependency during the year before retirement is not impermissibly discriminatory in providing only for those children for whom the loss of the parent's income is an immediate source of need.

The classification in issue is permissible because it is reasonably related to the likelihood of dependency at retirement. It is reasonable for Congress to have decided that because natural children would usually be dependent upon their parents at retirement, there was no need for a case-by-case showing of dependency. The expense and administrative burden of large numbers of individualized determinations justified the inherent imprecision of a rule establishing a presumption of dependency. Congress could also have reasoned that the number of natural children had by parents of retirement age would have a minor impact on the social security trust fund and therefore neither required or justified a special classification.

On the other hand, Congress reasonably viewed with concern the potential impact upon the trust fund of wholesale adoptions by retired wage earners who had nothing to lose and something to gain for themselves or for children whom they cared to benefit or for parents who wished to shift their children to the trust fund. The legislative history in H.R. 92-231, supra, evidences the congressional desire for having a safeguard against abuse through adoption solely to qualify children for benefits. The need for a special rule in the case of children adopted after retirement being apparent, the classification which requires after-adopted children to show at least one-half support in the year before retirement reasonably serves a legitimate governmental interest.

The materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect

need not be scientifically substantiated and it is the appellant's burden to domonstrate the insubstantiality of that relation. Mathews v. Lucas, supra, 44 U.S.L.W. at 5143 (citations omitted). The challenged classification is a reasonable and consistent with the statutory scheme to condition benefits upon dependency at a relevant time such as that of the death or retirement of the wage earner.

The claimant relies on Jiminez v. Weinberger, supra. In that case illegitimate children were born after the onset of the wage earner's disability. There was a statutory bar to benefits imposed such that no nonlegitimated illegitimate born after the onset of disability could prove dependency. However, other classes of after-born illegitimate such as those who are legitimated or entitled to inherit under State law could receive benefits. The Supreme Court invalidated the distinction because the blanket conclusive exclusion of after-born nonlegitimated illegitimates was not reasonably related to the objective of preventing spurious claims of dependency.

Unlike the classification invalidated in Jiminez v. Weinberger, supra, the provision here in issue does not establish a conclusive exclusion of a class regardless of dependency and unrelated to the objective of preventing spurious claims. Not only is the abuse to be guarded against more obvious, but the classification does not bar a showing of dependency, albeit in a specific manner.

In considering Mathews v. Lucas, supra, the Supreme Court distinguished Jiminez in a manner applicable here:

> But this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in Jiminez, is absent

> here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support . . .. 44 U.S.L.W. at 5144.

Finally, the Secretary submits that the congressional choice of a requirement for dependency during the year preceding retirement, as well as being consistent with the overall scheme based on dependency at some relevant time, is not unreasonably restrictive. See Weinberger v. Salfi, supra. Not all dependents are entitled to benefits under the Social Security Act. Widos receive no benefits under the age of 60. Children at age 19 may not receive benefits unless attending school. Dependency itself is an imprecise concept tied to the congressional notion of abuse, or what ought not to be. It was not incumbent upon Congress to provide benefits for children adopted after retirement who then became dependent on a retired wage earner. That such adopted children are provided for if they are also natural children of step children of the wage earner evidences not the existence of a design for their coverage, but a reasonable judgment about the probable dependency of certain children at retirement and the inherent imprecision of a prophylactic presumption. According the presumption to the appellant is unnecessary, Mathews v. Lucas, supra, 44 U.S.L.W. at 5145, and to do so would be an assumption of the congressional right to make reasonable and practical social calculations.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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/s/ _____
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STATUTORY ADDENDUM

Pertinent Parts of the Social Security Act as amended

Section 202, 42 U.S.C. §402

* * * *

(d) Child's insurance benefits.

(1) Every child (as defined in section 216(e)) [of this Act] of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual if such child --

(A) has filed application for child's insurance benefits,
(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability . . .
(C) was dependent upon such individual --

(i) if such individual is living, at the time such application was filed,
(ii) if such individual has died, at the time of such death, or
(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of this death, at the beginning of such period of disability or at the time he became entitled to such benefits.

shall be entitled to a child's insurance benefit ***.

* * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or his adopting mother at the time specified in paragraph (1)(C) [of this subsection] unless, at such time, such individual was not living with or contributing to the support of such child and --

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) [of this Act] shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or a stepmother at the time specified in paragraph (1)(C) [of this subsection] if, at such time, the child was living with or was receiving at least one-half of his support from such stepfather or stepmother.

* * * *

(8) In the case of --

(A) An individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B)), or

(B) an individual entitled to disability insurance benefits, or an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits,

a child of such individual adopted after such individual became entitled to such old-age or disability insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(C) unless such child --

(C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or

(D) (i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,

(ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (A), for the year immediately before the month in which such individual became entitled to old-age insurance benefits ***.

* * * *

Section 205, 42 U.S.C. §405

* * * *

(g) Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant of such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of the Judicial Code of the United States to recover on any claim arising under this Title.

* * * *

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v.

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